Sop Plantations (Suai) Sdn Bhd v Ading Ak Layang & Ors

HIGH COURT (M1RI) — ORIGINATING SUMMONS NO 24–342 OF 2003 (MR)
ABDUL AZIZ ABDUL RAHIM JC
14 MAY 2004

Land Law — Customary land — Right to — Occupation of customary land — Whether such occupation illegal — Issuance of provisional lease — Whether illegal occupiers have native customary rights — Whether triable issues raised — Rules of the High Court 1980 O 89

Native Law and Custom — Land dispute — Customary rights over land — Land occupied by ancestors — Methods by which native customary rights can be created — Sarawak Land Code s 5(2)

Words and Phrases — Shall — Meaning of

The plaintiff, by originating summons ('application') dated 30 October 2003, prayed for an order that he be given possession of all the parcel of land known as Lot 931 Niah Land District, containing an area of 1054 hectares ('the land'), on the ground that he was entitled to possession and that the defendants were in occupation without license or consent. The plaintiff had been issued with a provisional lease title on 2 July 2003 under the provisions of the Sarawak Land Code ('the Code'). The defendants opposed the application on the ground that the land was within the boundary of the native customary land of the three longhouses; namely Rumah Ulat, Rumah William Tinggang and Rumah Muyang, in which they claimed to have native customary rights over it. The defendants denied that that they were in illegal occupation of the land and because the they had been on the land since their ancestors they did not require any consent or permit to continue to occupy or use the land for farming and cultivation or such other activities to support their livelihood and that the Land and Survey Department never notified them on the issuance of the provisional lease to the plaintiff. The plaintiff, on the other hand averred that the area claimed by the defendants as their native customary land lied outside the boundary of the land Lot 931.

Held, allowing the plaintiff's application with costs:

(1) Non-compliance with O 41 r 11(2) of the Rules of the High Court 1980 ('the RHC') is fatal in this case. It is only an irregularity. Even though the photographs were exhibited in two sets of four and ten photographs respectively, each set had been adequately and properly identified by a certificate of the commissioner of oath who administered the oath to the deponent of the affidavit in which the photographs were exhibited. As to the annotation to each of the photographs, sufficient reference to it was found in the body of the affidavit itself (see para 18).

(2) It is settled law that O 89 r 1 is not a proper procedure to follow in cases where there is a dispute to facts and where the defendant has raised a

triable issue that merits a full trial. Whether or not in each particular case there was a triable issue that should go to trial had to be decided on the facts and circumstances in each case (see para 28).

(3) It can be seen that under the definition of 'native customary land' in paragraph (a) of the interpretation section of the Sarawak Land Code ('the Code'), land which the defendants can claim as such must be land over which the customary rights have been created before 1 January 1958 and those rights still subsist over the land. The methods by which these rights may be acquired are stated in s 5(2) of the Code. However, s 5(1) of the Code categorically states that no recognition shall be given to any native customary rights over any land in Sarawak created after 1 January 1958. It could also be seen from the same section that native rights over land that were created after the date and given recognition were rights that were created pursuant to a permit issued under s 10 of the Code (see para 34).

(4) There is also a presumption under s 5(3) of the Code that in any disputes over State land as to whether or not customary rights exist or subsist over the land it is presumed until the contrary is proved that no such rights exist or subsist. As the defendants had not shown in their affidavits that they been issued with titles to the land which they claimed to have customary rights. Thus, the land was considered as State land because the proviso to s 5(2)(i) of the Code applies (see para 35).

(5) The burden is on the defendants to prove the existence of the native customary rights and if the court finds, on the affidavits' evidence, that the evidence is unsatisfactory and unconvincing, the court may reject the evidence. To prove their claim of native customary rights the defendants must do so by cogent evidence. Bare assertion would not be sufficient (see para 38); *Tapah bin Bangkol v Superintendent of Lands and Surveys* [1999] 3 MLJ 588 followed.

(6) Even though the evidence is by affidavits, this does not means that if there is a conflict of evidence in the affidavits the court should as a matter of course ruled that there are triable issues. In such circumstance, the court must evaluate the evidence critically and comes to its proper conclusion as supported by the evidence (see para 45).

(7) The word 'shall' in the section makes it mandatory on the part of the Director of Land and Survey, who is the authority to alienate State land under s 13(1) of the Code, to ensure that all native customary rights over State land had been surrendered or terminated or that provision have been made to compensate those who are entitled to compensation before alienating any State land over which customary rights have been lawfully created (see para 48).

[**Bahasa Malaysia summary**

Plaintif, melalui saman pemula ('permohonan') bertarikh 30 Oktober 2003, memohon satu perintah bahawa beliau diberi milikan semua bidang tanah

dikenali sebagai Lot 931 Daerah Niah, mempunyai keluasan 1054 hektar ('tanah tersebut'), atas alasan bahawa beliau berhak untuk memiliki tanah tersebut dan bahawa defendan telah menduduki tanah tersebut tanpa lesen dan kerelaan. Suatu hak milik pajakan sementara telah dikeluarkan kepada plaintif pada 2 Julai 2003 di bawah Kanun Tanah Sarawak ('Kanun tersebut'). Defendan-defendan telah membantah permohonan tersebut dengan alasan bahawa tanah tersebut adalah terletak di kawasan sepadan tanah adat anak watan kepada tiga rumah panjang iaitu Rumah Ulat, Rumah Willian Tinggang dan Rumah Muyang, yang mana mereka telah menuntut bahawa mereka mempunyai hak-hak anak watan ke atas tanah tersebut. Defendan-defendan menafikan mereka menduduki tanah tersebut secara tidak sah dan oleh kerana mereka telah menduduki tanah tersebut sejak dari nenek moyang mereka, mereka tidak memerlukan sebarang kerelaan atau permit untuk terus menduduki atau menggunakan tanah tersebut untuk berkebun dan penanaman atau aktiviti-aktiviti lain untuk menyara kehidupan dan Jabatan Tanah dan Ukur tidak pernah memaklumkan mereka tentang keluaran pajakan sementara kepada plaintif. Plaintif, sebaliknya menegaskan bahawa kawasan yang dituntut oleh defendan-defendan sebagai tanah adat anak watan berada di luar sempadan tanah Lot 931.

Diputuskan, membenarkan permohonan dengan kos-kos kepada plaintif:

(1) Ketidakpatuhan A 41 k 11 (2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') tidak membawa mudarat kepada kes ini. Ia merupakan satu luar aturan. Walaupun fotograf-fotograf diekshibitkan kepada dua set empat dan sepuluh fotograf masing-masing, setiap set telah dicamkan dengan sah dan secukupnya oleh sijil Pesuruhjaya Sumpah yang mentadbirkan sumpah kepada deponen afidavit di mana fotograf-fotograf diekshibitkan. Berkaitan dengan anotasi kepada setiap fotograf, rujukan yang mencukupi kepadanya boleh didapati di badan afidavit berkenaan (lihat perenggan 18).

(2) Ia merupakan undang-undang tetap bahawa A 89 k 1 bukan merupakan prosedur betul di dalam kes-kes di mana terdapatnya pertikaian terhadap fakta-fakta dan di mana defendan telah menimbulkan isu yang boleh dibicarakan yang mewajarkan perbicaraan penuh (lihat perenggan 28).

(3) Ianya boleh dilihat bahawa di bawah definasi 'tanah adat masyarakat asli' di dalam perenggan (a) kepada bahagian tafsiran Kanun Tanah Sarawak ('Kanun tersebut'), tanah yang defendan-defendan boleh tuntut mestilah tanah yang hak-hak adat telah diwujudkan sebelum 1 Januari 1958 dan hak-hak tersebut masih kekal ke atas tanah tersebut. Cara-cara hak-hak ini boleh diambil ada disebutkan di dalam s 5(2) Kanun tersebut. Walau bagaimanapun, s 5(1) Kanun tersebut menegaskan bahawa tiada pengiktirafan boleh diberi kepada sebarang hak-hak adat anak watan ke atas tanah di Sarawak diwujudkan selepas 1 Januari 1958. Ianya juga boleh dilihat daripada seksyen yang sama bahawa hak-hak anak watan telah diwujudkan menurut permit yang dikeluarkan di bawah s 10 Kanun tersebut (lihat perenggan 34).

(4) Terdapat andaian di bawah s 5(3) Kanun tersebut bahawa sebarang pertikaian ke atas tanah Negeri berhubung sama ada atau tidak hak-hak adat wujud atau kekal ke atas tanah itu, ianya diandaikan sehingga sebaliknya dibuktikan bahawa hak-hak tersebut tidak wujud atau kekal. Oleh kerana defendan-defendan tidak menunjukkan di dalam afidavit mereka bahawa mereka telah dikurniakan dengan hak milik kepada tanah yang mereka tuntut sebagai mempunyai hak-hak adat. Oleh itu tanah tersebut dianggap tanah Negeri kerana proviso kepada s 5(2)(i) Kanun tersebut adalah terpakai (lihat perenggan 35).

(5) Beban adalah kepada defendan-defendan untuk membuktikan kewujudan hak-hak adat anak watan dan sekiranya mahkamah mendapati, berdasarkan bukti afidavit, bahawa keterangan itu tidak memuaskan dan tidak meyakinkan, mahkamah boleh menolak bukti itu. Untuk membuktikan tuntutan mereka terhadap hak-hak adat anak watan defendan-defendan mestilah melakukannya dengan keterangan yang jelas. Kenyataan asas tidak memadai (lihat perenggan 38); *Tapah bin Bangkol v Superintendent of Lands and Surveys* [1999] 3 MLJ 588 diikut.

(6) Walaupun keterangan adalah melalui afidavit-afidavit, ini tidak bermaksud bahawa sekiranya terdapat konflik keterangan di dalam afidavit-afidavit mahkamah hendaklah menurut keadaannya memutuskan bahawa terdapat isu-isu yang boleh dibicarakan. Di dalam keadaan demikian mahkamah mestilah menilai keterangan secara kritikal dan memberikan kesimpulan yang wajar yang disokong oleh keterangan (lihat perenggan 45).

(7) Perkataan 'shall' di dalam seksyen itu membuatkan ianya mandatori kepada Pengarah Tanah dan Ukur, yang merupakan autoriti to memberi milikan tanah Negeri di bawah s 13(1) Kanun tersebut, untuk memastikan bahawa semua hak-hak adat anak watan ke atas tanah Negeri telah diserahkan atau ditamatkan atau bahawa peruntukan telah dibuat untuk memberi pampasan kepada mereka yang berhak kepada pampasan sebelum memberi milikan sebarang tanah Negeri yang mana hak-hak adat telah diwujudkan secara sah (lihat perenggan 48).]

Notes

For cases on customary rights over land, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 632–639.

For cases on rights to customary land, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) para 2322.

Cases referred to

Abdullah Rohani v Puncak Klasik Sdn Bhd [2004] 1 CLJ 773 (refd)

Ara binte Aman & Ors v Superintendant of Lands and Mines 2nd Division [1979] 1 MLJ 208 (refd)

Bohari bin Taib & Ors v Pengarah Tanah dan Galian Selangor [1991] 1 MLJ 343 (refd)

Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281
Ng Kon Yu v Sakim bin Saiking & Ors [2001] 4 MLJ 140 (refd)
Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors [2001] 6 MLJ 241 (refd)
Salim bin Ismail & Lain-Lain lwn Lebbey Sdn Bhd (No 2) [1997] 2 MLJ 4 (refd)
Shaheen bte Abu Bakar v Perbadanan Kemajuan Negeri Selangor [1998] 4 MLJ 233 (refd)
Tapah bin Bangkol v Superintendant of Lands and Surveys [1999] 3 MLJ 588 (folld)
Zaibar Auto (M) Sdn Bhd & Anor v Shell Malaysia Trading Sdn Bhd [1996] 2 MLJ 221 (refd)

Legislation referred to

Adat Iban Order 1993 s 2(2), 133
Land Code (Amendment) Ordinance 2002 (Cap A95/02)
Rules of the High Court 1980 O 14, O 41 rr 11(1), (2), O 89 r 1
Sarawak Land Code, ss 5(2)(i), 5(3), 6, 10, 15(1)
Sarawak Land Laws and Adat 1961, para 15

Gabriel Kok (Khoo & Co) for the plaintiff.
Harisson Ngau (HNL & Co) for the defendants.

Abdul Aziz Abdul Rahim JC:

[1] By originating summons dated 30 October 2003 — encl 3 ('the application') the plaintiff prays for an order that the plaintiff be given possession of all the parcel of land situate at Bukit Berayon, Niah containing an area of 1054 hectares, more or less and described as Lot 931 Niah Land District on the ground that the plaintiff is entitled to possession and that the defendants are in occupation without license or consent.

[2] The areas in dispute are marked in the map or plan in exh A-5 in the affidavit in reply by the first defendant, Ading anak Layang, affirmed on 12March 2004 — encl 25 ('first defendant's affidavit in reply').

[3] The area claimed by the plaintiff, that is Lot 931, Niah Land District ('the land'), is within the area that is edged in green in exh A-5 of first defendant affidavit. For this area, the plaintiff has been issued with a provisional lease ('the PL') title by the Superintendent of Lands and Surveys under the provisions of the Sarawak Land Code ('the Code'). The PL is exhibited as exh DE-1 in the plaintiff's affidavit in support of the application, affirmed by Sanggau @ Dunstan Endawie Anak Briton on 24 October 2003 — encl 2 ('Dunstan's affidavit').

[4] It is also marked in exh A-5 the area, which the first to sixth defendants claimed to be the native customary land of the three longhouses namely Rumah Ulat, Rumah William Tinggang and Rumah Muyang. This area is edged in red, which the first to the sixth defendants claimed to be the

boundary or 'garis menua', in exh A-5 and comprised all the area within it. Rumah Ulat is shaded in yellow on exh A-5.

[5] The first to sixth defendants opposed the application on the sole ground that they have native customary rights over the land. The first to sixth defendants who are all from Rumah Ulat (as can be seen from the address used in the originating summons) also claimed that in opposing the application they represent the occupants of Rumah Ulat, Rumah William and Rumah Muyang. The plaintiff denies the first to sixth defendants representative capacity and also denies that the first to sixth defendants have any claim of native customary rights ('NCR') over any part of the Lot 931, the land. Instead the plaintiff said that it had been issued with the PL and therefore is entitled to the possession of the land. Plaintiff also said that the first to sixth defendants must prove their claim of NCR over the land and this they have not done so. In answer to this contention, the first to sixth defendants said that for the purpose of this application all they have to do is to show a triable case or triable issues; if they can do it the application should not be allowed and the matter should be put to trial.

[6] To support their claim for NCR, the first to sixth defendants have, in the first defendant affidavit in opposition affirmed by Ading ak Layang — encl 12 (first defendant affidavit in opposition], exhibited exh A-l which is alleged to be Composite Plan Showing Distribution of Native Farming Land at Sua/Niah/Sibuti Misc Plan No 4/1249-3. The first to sixth defendants contended that exh A-l shows that between 1939 and 1954 the communal native customary land boundary of the three longhouses, ie Rh Ulat, Rh William and Rh Muyang was officially demarcated and recorded by the Government. According to the first defendant, exh A-l was given to the defendants by an official of the Lands and Surveys Department Miri many years ago. The first defendant in his affidavit also said that defendants had not been told by the Government that exh A-l has been withdrawn, revoked or not recognized. Paragraphs 3.1 and 8.2 of the second defendant affidavit affirmed by Guyang ak Ujan on 12 March 2004 — encl 26 ('second defendant's affidavit in reply) also averred to the same facts. In other words the first to sixth defendants are saying that exh A-l is the evidence of their claim of NCR over the land Lot 931. The first defendant also averred in his affidavit in opposition (encl 12) that the defendants have been continuously using and occupying the native customary land since the times of their ancestors by farming, hunting, fishing in the rivers and collecting forest produce therein. The first defendant said that the native customary land is an important source of livelihood for his people and that according to the Iban Adat or customs the present generation holds the land as trustees for the future descendants and it goes on in that manner. In the same affidavit, the first defendant said that the defendants never received any notice of the extinguishments of their NCR over the land or had never surrender them to anyone or to the Government. He also said that no one from the three longhouses mentioned above have ever been arrested or charge for illegal cultivation or occupation of the land. Therefore the first defendant denies

that they were in illegal occupation of the land. And because the defendants have been on the land since their ancestors they do not require any consent or permit to continue to occupy or use the land for farming and cultivation or such other activities to support their livelihood. In paragraph 5.2(g) of his affidavit in opposition (encl 12), the first defendant said that the Land and Survey Department never notified the defendants on the issuance of the PL to the plaintiff on 2 July 2003. In the same affidavit in opposition the first defendant also exhibited exh A-2, which is a deed, dated 28 November 2001 entered into between the plaintiff and the persons named in the schedule to the deed, which included the first defendant.

[7] Perusal of the deed shows that the plaintiff had, on 9 May 1998 accepted the offer of alienation of the land by the state authority. The deed was made subject to the terms and conditions specified in the formal offer and acceptance of terms and conditions of alienation of land by private treaty/ballot/tender dated 17 April 1998 issued on behalf of the Superintendent of Land and Survey, Miri. The gist of the contents of the deed, exh A-2 is this. Each of the persons named in No 2 to No 9 in the Schedule to the deed would be paid an ex gratia payment of RM300 per hectare for every hectare of the land within the boundary of Lot 931 and RM20 for every fruit tree, rubber, cocoa, other crops and other trees and any improvement thereto which each of them claimed to have acquired native customary rights/native title/usufructuary rights, upon the completion of the parameter survey and the identification and confirmation of the parts or portion of the land which each of them claimed to have native customary rights. In return for the exgratia payment the persons named in the Schedule to the Deed (No 2 to No 9) would allow the plaintiff to enter Lot 931 to conduct the parameter survey for the purpose of identifying and marking the area within Lot 931 claimed by each of the person mentioned in the deed as their native customary land; and to allow the plaintiff, upon completion of the parameter survey to clear the land and develop it into an oil palm estate. It was also agreed in the deed that the payment of the ex gratia by the plaintiff was not an acknowledgement of the existence of the native customary rights over the land and that deed is not to be used as evidence of the same in any legal proceedings in relation to the land. The parties to the deed also agreed that upon receipt of the ex gratia payment each of the persons (No 2 to No 9) in the Schedule to the Deed shall surrendered to the plaintiff the area of the land which they claimed to have native customary rights to the plaintiff.

[8] The first defendant however denies that he had signed the deed. But the first defendant neither deny nor confirm that he had received the ex gratia payment under the deed. The first defendant silence on this means that the first defendant, though did not sign the deed, could have received the ex gratia payment.

[9] In the defendants' affidavit in opposition 2 (encl 13), affirmed by Guyang ak Ujan — the second defendant — on 5 February 2004 (second defendant's affidavit], the second defendant said that sometime in June 2002

he was employed by on Ah Tay, who was and still is the contractor for the plaintiff. The second defendant said in the course of his employment by Ah Tay, he was asked to clear the areas around Sg Manong, Sg Bebeli, Ulu Sg Kleba, Sg Tekalong, Sg Rusa and Sg Punai which are all within the 'garis menua' or native the customary land of Rh Ulat, Rh William and Rh Muyang as marked in green in exh Al in first defendant affidavit in opposition. The second defendant also states in his affidavit in opposition (in encl 13) that there were lots of 'temuda' and 'kebun' in the area of the three longhouses and he cleared some of these temudas and kebuns on the instruction of Ah Tay in spite of protest by their owners.

[10] The plaintiff on the other hand said, in Dunstan's affidavit, that the plaintiff is the registered lessee of the land Lot 931 and had exhibited the PL as exh DE-1. Dunstan, in his affidavit said that he is the senior assistant in charge of the plaintiff and that he visited the land on 2 September 2003, he discovered that the land had been trespassed, cleared and burnt by outsiders whom he later identified as the defendants. Dunstan also said in his affidavit that to his knowledge the defendants are neither tenants nor licensees of the plaintiff. Following the discovery of the alleged trespass, he had lodged a police report on 4 September 2003 at Batu Niah Police Station. The report is Police Report No Ba/RPT/741/03 and a copy of which is exhibited as exh DE-2 to Dunstan's affidavit.

[11] In another affidavit, that is affidavit in reply (1) jointly affirmed on 4March 2004 by Wong Hee Kwong and Eric Kiu Kwong Seng, the plaintiff's Chief Executive Officer/Director and Financial Controller/Company Secretary respectively — encl 23 (Wong's joint affidavit), the plaintiff averred that the area claimed by the defendants as their native customary land lies outside the boundary of the land Lot 931. To support this, the plaintiff exhibited two maps of the area obtained from the Jabatan Tanah dan Survei Sarawak as published by the Director of National Mapping Malaysia in 1973. These maps are exhibited as exh A(l) and A(2) to Wong's joint affidavit. At paragraph 5(b) of Wong's joint affidavit, the deponents deposed that the maps exh A(l) and A(2) were produced after aerial photography by the Royal Air Force in 1961 to 1963. Plaintiff said that it can be ascertained from the maps that between 1961 to 1963 the area in extreme north of the map which is coloured green had activity of shifting cultivation whereas the area coloured light yellow is covered by jungle only. To prove this averment, the plaintiff has also exhibited a transparency prepared by United Survey Consultants, the surveyors of the boundaries of Lot 931 as exh B in Wong's joint affidavit. According to the plaintiff if the transparency exh B is superimposed on the maps exh A(l) and A(2), it would be seen that only a small patch in the northeast of Lot 931 that had shifting cultivation in 1961 to 1963 when compared with the aerial photograph of the same period. Indeed it is so. The plaintiff further averred that this small patch in the north-east of Lot 931 is outside the boundary of Lot 931 and not within the area edged in red in exh A-l in the first defendant affidavit in opposition (encl 12) — an area described by the first defendant as belonging to Rh Ulat. Wong also said in his joint affidavit that when

plaintiff entered Lot 931 it was still jungle and there was no farming activity as described in the first defendant affidavit. The plaintiff also exhibited a License to Take Forest Produce issued to the plaintiff by the Forest Department Sarawak for the period from September 1998 to 2002 as exh C in Wong's joint affidavit. The plaintiff said the licence allowed plaintiff to extract timber from the area within Lot 931 for the said period and the plaintiff further averred that in the process the plaintiff did not encounter any activities referred to in paragraph 5(d) of the first defendant affidavit in opposition (encl 12).

[12] In the same affidavit (encl 23), the deponents also deposed that it is within the plaintiff knowledge that a substantial part of the area alleged to be the customary land of the defendants have been alienated and issued with titles by the relevant government authorities. The plaintiff then exhibited a transparency of Lot 931, the land, as exh D in the affidavit. The same consultant that prepared exh C prepared this transparency. It was shown that if the exh D is superimposed on the survey map of Lot 931, the whole area that have been alienated and claimed to be native customary land is outside the boundary of Lot 931.

[13] The plaintiff also exhibited the evidence of surveys using Global Positioning System to produce GPS Survey Map. This map is exh E in Wong's joint affidavit. The GPS map clearly shows that the area allegedly unlawfully occupied by the defendants are well within Lot 931, which the plaintiff owns by virtue of the PL, and are well outside the claimed native customary land.

[14] The plaintiff also challenged the capacity of the defendant to oppose this application saying that each of defendants No 1 to No 6 is acting in their individual capacity and not in representative capacity for the communities of the three longhouses namely Rh Ulat, Rh William and Rh Muyang. In this regard also the plaintiff challenged the evidence of exh A-2 — which is the deed — in the first defendant affidavit. The plaintiff said it had never executed the deed as in exh A-2 even though it seems that the plaintiff's signatures are on exh A-2. Instead the plaintiff deposed in Wong's joint affidavit that it had entered into a deed on 21 September 2001, signed on behalf of the plaintiff by the deponents to Wong's joint affidavit, with Tuai Rumah Muyang, Tuai Rumah Tinggang (William) and Tuai Rumah Ulat to pay them ex gratia payments in consideration for unhindered access to Lot 931 to, inter alia, conduct parameter survey of Lot 931. The deed dated 21 September 2001 between the plaintiff and the three Tuai Rumahs is exhibited as exh F in Wong's joint affidavit. The plaintiff averred that the authenticity of defendants' exh A-2 is also suspected because a copy of A-2 was not in the plaintiff's record and when comparison is done between defendants' exh A-2 and the plaintiff's exh F the plaintiff normal and usual practices for all deeds are absent. These practices, as stated in paragraph 9 of Wong's joint affidavit, are as follows: a) the endorsement on the top right hand corner of the contract number; b) the initialling on every page of the Deed; and c) the signature of the witness witnessing the signatures of all the signatories to the deed. The plaintiff also said that in defendants' exh A-2 the date endorsed therein is 28 November 2001

and it contained no signature part of the other party as well as the witnessing and the initialling of every page. In paragraph 10 of Wong's joint affidavit, it was deposed that the plaintiff's solicitors have requested the defendants to furnish a copy of exh A-2 and also has sought from the defendants further and better particulars of the same exhibit. These requests are exhibited as exhs G and H in Wong's joint affidavit. In paragraph 11(b) of Wong's joint affidavit the plaintiff averred that the first defendant is not making full disclosure to the court in opposing the plaintiff's application. This is so because according to the plaintiff, the first defendants had on or about 3 February 2004 wrote a letter in Iban language to the plaintiff for compensation for the alleged native customary rights. The first defendant's letter and its translation in English are exhibited as exh I and J respectively in Wong's joint affidavit. It is to be noted that in his letter exh I the first defendant has signed as 'Lading anak Layang and friends'. It seems therefore that the plaintiff's claim that it never entered into the deed as in first defendant exh A-2 is correct after all; and that in all probability that the deed was entered between the plaintiff and the three Tuai Rumahs as in plaintiff's exh F. It also makes a lot sense because it is common knowledge, and of which the court may take judicial notice of, that every longhouse has a Tuai Rumah or Chief. And in dealing with communal rights or property of a particular longhouse community such as the native customary rights and native customary land, it is appropriate and proper and in fact it is the practice to deal with the Tuai Rumah or the chief of the longhouse concerned.

[15] In reply to the defendants affidavit in opposition 2 (encl 13) affirmed by Guyang anak Ujan, the second defendant, the plaintiff deposed in Wong's joint affidavit (encl 23) that the second defendant also is not acting in representative capacity representing Rh Ulat but as individual. Further, the plaintiff said in paragraph 15(b) of Wong's joint affidavit that the second defendant could not have personal knowledge of the existence of any customary rights or customary native land before 1 January 1958 because he was born in 1962. Under the Sarawak Land Code, no native customary rights or native customary land can be created after that date without a permit from the Superintendent of Land and Survey. The second defendant claim of ownership of 'temuda' is also not supported because the second defendant has not produced any evidence of title or ownership. In reply to Guyang's affidavit in opposition 2 (end 13) Wong and Eric repeated, in their joint affidavit in reply I (encl 23), that the defendants' alleged area of native customary land is outside the boundary of Lot 931 and that the plaintiff had entered into a deed with the all the Tuai Rumahs of the longhouses for permission to access and conduct parameter survey of Lot 931.

[16] In reply to Wong's joint affidavit (encl 23), the first defendant affirmed another affidavit in reply 1 on 12 March 2004 (encl 25 — 'first defendant's affidavit in reply 1'). In this affidavit, the first defendant repeated the claim that Lot 931 is within the defendants' 'garis menua' as edged in red in exh A-1. He further deposed that the 'garis menua' in the Suai/Niah/Sibuti areas were recognized and recorded by the Government since early 1940 and averred

that this record is shown in exh A-1 in the first defendant affidavit in opposition (encl 12). The first defendant also averred that the 'garis menua' is often referred to if there is dispute between the longhouses as to their farmland boundary and the first defendant cited an example whereby a Native Court had referred to the 'garis menua' to determine a disputes involving one Rumah Manggoi and Rumah Gawan in 1950s; the case went up to the Supreme Court then on appeal but was dismissed by the Supreme Court. The decision of the Supreme Court is exhibited as exh A-4 to the first defendant affidavit in reply 1. The first defendant averred in paragraph 3(viii) of this affidavit that he is authorised by residents of all the three longhouses to depose the facts as to the communal boundary or 'garis menua' of the native customary rights of the longhouses as in exh A-l. The first defendant also exhibited exh A-5 — a map which he drew himself together with the second to the sixth defendants showing the 'garis menua' based on exh A-l in the first defendant affidavit in opposition (encl 12), the boundary of Lot 931 based on exhs B, D and E in Wong's joint affidavit in reply 1 (encl 13), the boundary of the Niah Forest Reserve and the approximate locations of some of the 'temuda' of the three longhouses and including his own 'temuda' and that of second to sixth defendants. Apparently exh A-5 is a response to the exh B, D and E in Wong's joint affidavit in reply 1. However it is to be noted that the maps as in exhs B, D, and E were drawn by a qualified surveyor as compared to the maps in exhs A-5 and A-1 that were drawn by the first defendant and the second to the sixth defendants who were not trained surveyor and who required interpreter to affirmed their affidavits. Therefore, the accuracy of exhs A-1 and A-5 when compared to the accuracy of exhs B, D and E may be in question.

[17] The first defendant also exhibited in his affidavit in reply 1 (encl 25) two set of photographs. The first set of four photographs, which he claimed were taken by the second defendant on the 8 March 2004 at various sites within and around the area within the 'garis menua', is exhibited as exh A-6. The second set of ten photographs that he claimed also taken by the second defendant on the same day showing first defendant's 'temuda' and that of other defendants and other residents of the longhouses as exh A-7. By these photographs the defendants are trying to show that the area in question as marked by the 'garis menua' in exh A-5 of the first defendant affidavit in opposition (encl 12) is occupied and cultivated.

[18] As to these photographs in exhs A-6 and A-7 of the first defendant affidavit in reply (encl 25), learned counsel for the plaintiff submitted that there are being exhibited not in accordance with the requirement of O 41 r11(1) of the Rules of High Court 1980 ('the RHC') in that the photograph should have been exhibited individually. He also submitted that the annotation to each of the photographs should not be considered because the annotation is not made under oath. I do not think that none strict compliance with O 41 r 11(2) of the RHC is fatal in this case. I think it is only an irregularity. I find that even though the photographs are exhibited in two sets of four and ten photographs respectively, each set has been adequately and properly identified

by a certificate of the commissioner of oath who administered the oath to the deponent of the affidavit in which the photographs are exhibited. As to the annotation to each of the photographs, I find that sufficient reference to it is found in the body of the affidavit itself.

[19] But more importantly the plaintiff answer to these photographs is found in paragraphs 8 and 9 of the plaintiff's affidavit in reply II affirmed by Wong Hee Kwong (encl 28) on 31 March 2004 (Wong's second affidavit). In his second affidavit for the plaintiff, Wong deposed that the first defendant in his affidavit in reply 1 (encl 12) admitted that the photographs exh A-6 were taken at the Niah Forest Reserve. Therefore, these photographs are irrelevant because they were taken of area outside Lot 931. The defendant does not deny this. As to the paragraphs in exh A-7, Wong deposed in his affidavit that the hut in photograph 1 and 2 seems to be new and recently built and the surrounding does not show continuous cultivation being carried out. Wong also deposed that the owners of the land shown in photographs 3, 4, 5, 6, 7 and 8 of exh A-7 are not parties to the action and have not affirmed any affidavit to substantiate their claim over the area. As to photographs 9 and 10 in exh A-7 the first defendant claimed that the area belong to fifth defendant. But the fifth defendant did not affirm any affidavit to support such claim. It would render the claim more acceptable and plausible had the fifth defendant himself affirmed an affidavit to the effect. There is also no reason given as to why the fifth defendant could not affirmed an affidavit to substantiate his claim over the area which he claims he inherited from his forefathers.

[20] In Wong's second affidavit in reply (encl 28), the plaintiff once again challenged the claimed by the first defendant that he represents, and is authorized by, the other defendants to make the affidavit in reply (encl 12). Wong deposed that though the first defendant affirmed in his affidavit that he had spent some time with the other defendants on 8 March 2004, he did not see fit to obtain any written authorization from them to act on their behalves. The plaintiff also exhibited exh K in Wong's second affidavit, which is a map, obtained from the Department of Land and Survey Miri. This map shows part of Lot 931 and the land to the north of its northern boundary. Exhibit K shows that the land north of the plaintiff's Lot 931 have been gazetted as Mixed Zone Land since 22 October 1954. That means the land may be alienated or transferred to non-natives. It is obvious from exh K that there are numerous parcels of mixed zone land alienated to third parties in the area north of Lot 931 which the defendants also claimed as their NCR land. Exhibit K also shows that the boundary from the defendants' alleged NCR land of Sungei Niah, as shown in exh A-5 in first defendant affidavit in reply (encl 12), is also the boundary where the mixed zone titles extend. It is obvious too from exh K that the defendants also claimed the Batu Niah Feeder Road as their NCR land.

[21] In his second affidavit in reply, Wong also deposed that the plaintiff had made enquiries with the Sarawak Forestry Corporation Sdn Bhd and had obtained a map, which is exhibited as exh L in the affidavit. Exhibit L shows

that the south-east boundary of the plaintiffs Lot 931 is also contagious to the boundary of the Niah Forest Reserve. The plaintiff had also reproduced exh A-5 in first defendant affidavit in reply 1 (encl 25) and exhibited it as exh M in Wong's affidavit in reply II (encl 28). If exh L is compared with exh M it is obvious that the defendants are also claiming part of the Niah Forest Reserves as their NCR land. Wong further deposed in his second affidavit in reply that the plaintiff had conducted a random search of the land nearer to Rumah Ulat which the plaintiff said have been gazetted as mixed zone. The random search at the Land Registry reveals that some of the land have been alienated with titles. Some of the result of the search is exhibited as exhs N, O, P, Q, R, S and T in Wong's second affidavit.

[22] The plaintiff also refuted the claim by the defendants that the PL granted to the plaintiff excludes the native customary land or is subject NCR. Perusal of the copy of PL exhibited as exh DE-1 in Dunstans's affidavit in support of the plaintiff application does not support such claim.

[23] The second defendant also filed an affidavit in reply 2 to the Wong's first affidavit in reply. In his second affidavit, the second defendant besides repeating what he had deposed in his first affidavit in opposition the second defendant also exhibited six photographs as exh G-l. These photographs, according to the second defendant, were taken by him on 8 March 2004 when he visited the area with his father in law who is also the Tuai Rumah Ulat, his lawyers and the other defendants. The first defendant in his affidavit in reply 1 did not depose to the fact of this visit. The second defendant purportedly took the exhibited photographs. These photographs however do not show cultivations by the natives or the second defendant. Instead they show machineries and workers shed and campsite, which belong to the plaintiff. The first defendant also affirmed a third affidavit in reply. This is affidavit in reply 3 (encl 33) affirmed by the first defendant on 14 April 2004. In this affidavit, the first defendant disputed the averments contained in Wong's second affidavit in reply II. The first defendant repeated that the defendants lawfully acquired the native customary rights ('NCR') over the land in plaintiff's Lot 931 from their ancestors. The first defendant also said at paragraph 4.2 of his affidavit that the residents of the three longhouses namely Rumah Ulat, Rumah William Tinggang and Rumah Muyang had, after a recent meeting held at Rumah Ulat, decided to commence legal proceedings to protect their NCR by filing a suit against the plaintiff. The first defendant then exhibited an unsealed copy of the writ of summons prepared by Messrs HNL & Co, Advocates as exh A-8 and the praecipe for filing of the writ as exh A-9.

[24] It is to be noted that the first defendant did not state in his affidavit in reply 3 that the meeting held at Rumah Ulat was sanctioned or called by the Tuai Rumahs or whether all the three Tuai Rumahs attended the meeting and had blessed the decision taken at the meeting. It is also to be noted that none of the three Tuai Rumahs is named as plaintiff in the writ in exh A-8. I also observed that, besides the six original defendants in this originating summons, there are ten new and additional plaintiffs named in the writ. These

ten new and additional plaintiffs named in the writ, except for Awang ak Bunyeh (the eighth plaintiff) and Timban ak Mengga (the 10th plaintiff), were never mentioned in any of the defendant's affidavits filed in opposing the plaintiff application in this originating summons. It is also quite difficult to comprehend why Tuai Rumah Ulat who featured in photographs No 3 and No 4 in exh A-6 and, Janting ak Belawan who featured in photograph No 4 in exh A-7, of first defendant affidavit in reply 1 (encl 25) were not named as plaintiff. They are also allegedly complained that their native customary land is within the plaintiff Lot 931.1 would say, in the circumstances, that in all probabilities the three Tuai Rumahs of Rumah Ulat, Rumah William and Rumah Muyang have no part in the alleged meeting and did not sanction the meeting if there was one. The six defendants are trying, in my opinion, to convince the other residents of the longhouses to oppose the granting of the PL to the plaintiff because of their dissatisfaction with the deed (exh F in Wong's affidavit in reply 1 — encl 23) entered into between the three Tuai Rumahs and the plaintiff. But the defendants did not get the full support of all the residents of the longhouses of which they claimed they represented.

[25] In paragraph 4.3 of his affidavit in reply 3, the first defendant admitted that part of the defendants native customary land within their communal land boundary was gazetted as mixed zone land. But the first defendant says the gazetting of the land as mixed zone does not extinguish the NCR or change the status of the native customary land into something different. In the same affidavit, the first defendant also said that the defendants are not claiming the Niah Forest Reserves as their native customary land or land over which they have NCR. In paragraph 4.5 of the affidavit, the first defendant says that the defendants and the people of the longhouses are very familiar with the boundary of the Niah Forest Reserves which is marked on the ground with 'tin plates'. These 'tin plates' markings are exhibited in photographs No 2 and No 4 in exh A-6 to first defendant affidavit in reply 1 (encl 25). But no where in the first defendant affidavit was it deposed as to who had put up the 'tin plate' markings. No doubt that there is annotation to the photograph No 2 in exh A-6 which claimed that the 'tin plate' marking was placed by the Forest Department. However as submitted by learned counsel for the plaintiff the annotation was never made under oath. Therefore, this claim should not be readily accepted. Further, there is also no deposition by the first defendant as to whether any boundary survey was conducted by the Forestry Department before the markings were put up. And if there was indeed a survey done it was not disclosed when it was done. It seems to me that the 'tin plate' markings of the Niah Forest Reserve boundary could have been put up by any one. By looking at the 'tin plate' marking shown in photograph No 2 in exh A-6 one cannot see or identify any marking or sign that shows it was put up by the Forestry Department or with its authority. These doubts could easily be cleared had the defendants filed an affidavit by an authorized officer in the Forestry Department as to the fact of the determination, survey and marking of the boundary of the Niah Forest Reserves.

[26] So much for the affidavit evidence in this case. I will now deal with the submissions by counsels. Both counsels submitted written submissions.

[27] Learned counsel for the defendants submitted that the plaintiff application is made under O 89 r 1 of the RHC. Therefore, it is necessary for the plaintiff to show that the defendants are occupying the land without the plaintiff's licence or consent or that of any of the plaintiff predecessors in title and that the defendants are not a tenant holding over after the termination of a tenancy. He also submitted that the plaintiff is required to state in an affidavit its interest in the land and the circumstances in which the land has been occupied without licence or consent. Learned counsel for the defendants then submitted that under O 89 r 1 of the RHC the principles applicable are the same as in an application under O 14 of the RHC that is the defendants need only to show a triable issue to let the matter goes to trial. In support of his contention, learned counsel cited the case of *Bohari bin Taib & Ors v Pengarah Tanah dan Galian Selangor* [1991] 1 MLJ 343 and the case of *Salim bin Ismail & Lain-Lain lwn Lebbey Sdn Bhd (No 2)* [1997] 2 MLJ 4. In addition, learned counsel also referred to the following authorities: *Zaiba Auto (M) Sdn Bhd & Anor v V Shell Malaysia Trading Sdn Bhd* [1996] 2 MLJ 221; *Shaheen bte Abu Bakar v Perbadanan Kemajuan Negeri Selangor* [1998] 4 MLJ 233; *Abdullah Rohani v Puncak Klasik Sdn Bhd* [2004] 1 CLJ 773 and *Ng Kon Yu v Sakim bin Saiking & Ors* [2001] 4 MLJ 140.

[28] From the above authorities, I agree that it is settled law that O 89 r 1 is not a proper procedure to follow in cases where there is a dispute to facts and where the defendant has raised a triable issue that merits a full trial. But then whether or not in each particular case there is a triable issue that should go to trial has to be decided on the facts and circumstances in each case. In the case of *Bohari* and *Salim* cited by the learned counsel for the defendants, there is a clear and undisputed evidence in the affidavit, of temporary occupation licence ('TOL') been given to the appellants in both cases by the state authority to occupy the state land before the land was alienated. Even though the TOL had expired, the authorities did not take any action to evict the appellants from the land at the expiry of the TOL, or soon afterwards. In the circumstances of the long occupation by the appellants on the land and the fact that no action being taken to evict them after the expiry of the TOL, the court in the two cases held that the issue whether there is consent by the state authority for the appellants to continue occupying the land is a triable issue and ought to be determined at a full trial.

[29] In the instant case, the plaintiff has shown and produced as exh DE-1, the Provisional Lease to Lot 931 that was issued to it by the relevant authority. The PL is not subject to any claim of NCR. Plaintiff also has shown in its affidavits that it had conducted a parameter survey of Lot 931 and it had done so with the consent and knowledge of the three Tuai Rumahs as evident by the deed in exh F. The result of the survey shows that the area claimed by the defendants is outside Lot 931. The plaintiff proved this by maps in exhs A(1) and A(2) obtained from the Jabatan Tanah dan Survei Sarawak as published by the Director of National Mapping, Malaysia 1973. These maps were drawn from an aerial photograph taken between 1961–1963. The plaintiff also exhibited a transparency exh B prepared by the same surveyor

that did the parameter survey. If the transparency exh B is superimposed on exhs A(1) and A(2) it would show that the area claimed by the defendants is well outside Lot 931. I accept this evidence as the better evidence when compared to first defendant exh A-5. Though the map in exh A-5 is said by the first defendant that he obtained the map from the Land and Survey Department, the drawing of the 'garis menua' was not done based on any survey. Thus, its precise position is doubtful when compared to the boundary for Lot 931 which was drawn after a survey by a qualified surveyor.

[30] Learned counsel for the defendants submitted that the plaintiff application for possession should not be allowed because the defendants are claiming NCR over Lot 931 or part of it. Therefore, this a triable issue and cannot be resolved by affidavits evidence. Learned counsel for the defendants submitted that the defendants have shown in the first and second defendants affidavits, which I have alluded to above, that the defendants have acquired the NCR over the land from their ancestors. Learned counsel submitted that the 'garis menua' in exh A-5 exhibited by the first defendant shows the location and the area claimed as NCR to be inside Lot 931.

[31] It has been held in *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241 that native customary rights had always been recognized by the laws of Sarawak, as can be seen from the various legislations (including orders) passed by the state administration, from the time of James Brooke, through the time Sarawak came under the rule of the British Crown and finally until Sarawak became part of Malaysia.

[32] However, insofar as the customary rights relate to land, recognition of these rights has to be considered in the light of the provisions of the Sarawak Land Code. The interpretation section of the Code defines 'native customary land' to mean:

(a) Land which in which native customary rights, whether communal or otherwise, have lawfully been created prior to the 1st day of January, 1958 and still subsist as such;

(b) Land from time to time comprised in a reserve to which section 6 applies; and

(c) Interior Area Land upon which native customary rights have been lawfully created pursuant to a permit under section 10.

[33] Paragraphs (b) and (c) of the above definition are not relevant to the instant case. This is so because the application of s 6 and the permit under s 10 of the Code are not in issue.

[34] It can be seen that under the definition of 'native customary land' in paragraph (a) above, land which the defendants can claim as such must be land over which the customary rights have been created before 1 January 1958 and those rights still subsist over the land. The methods by which these rights may be acquired are stated in s 5(2) of the Code. But s 5(1) of the Code categorically states that no recognition shall be given to any native customary rights over any land in Sarawak created after 1 January 1958. It can also be

seen from the same section that native rights over land that are created after the date and given recognition are rights that are created pursuant to a permit issued under s 10 of the Code.

[35] At this juncture, it must be pointed out that the defendants in opposing the plaintiff's application seems to proceed on the footing that the area which they claimed to be native customary land or land over which they have customary rights belongs to the community of the three longhouses. In other words, it is a communal land or communal rights. It seems to be so because no where in the affidavits filed by the defendants in this instant was it stated that individual titles had been issued to each of the defendants. The defendants also have not identified in their affidavits with such specificity the parts or portion of the land as belonging to each of them individually. This being the case, the defendants opposition to the plaintiff's application should be in representative capacity. But this is not so. This is obvious from the affidavits filed by the defendants in this case. Though the first and second defendants in their affidavits said that they have been authorized by the other defendants to depose the affidavits, the first and second defendants did not say that they and the other defendants are opposing the plaintiff's application in their own capacity and as representatives of all the residents of the three longhouses. Then there is also a presumption under s 5(3) of the Code that in any disputes over State land as to whether or not customary rights exist or subsist over the land it is presumed until the contrary is proved that no such rights exist or subsist. As mentioned earlier, the first and second defendants have not shown in their affidavits that they been issued with titles to the land which they claimed to have customary rights. Thus, the land is considered as State land because the proviso to s 5(2)(i) applies.

[36] Therefore, it is up to the defendants to show proofs that they had customary rights over the land. In examining the evidence as to the existence of the customary rights, the court is mindful of the fact the defendants must show either the customary rights have been in existence before 1 January 1958 and still subsisting or that the rights were created after 1 January 1958 pursuant to a permit issued under s 10 of the Sarawak Land Code. In this instant case, the defendants are not claiming customary land rights created after 1 January 1958. And there is no evidence deposed in the defendants' affidavits filed in this instant case that show that the defendants or any of them had even been issued with the necessary permit under the Code to create such rights. So the defendants must show that the rights have been in existence before 1 January 1958 and still subsisting. At paragraph 5.1(c) of the first defendant affidavit in reply (encl 12), the first defendant deposed that sometime between 1939 and 1954, the communal native customary land boundary of our said longhouses and that of other longhouses neighbouring us were officially demarcated by Government and recorded in the Plan called 'Composite Plan Showing Distribution of Native Farming and Suai/ Niah/Sibuti Misc Plan No 4/1249-3'; and which plan the first defendant exhibited as exh A-l in his affidavit. It is obvious that in that paragraph the first defendant is deposing about an event that took place between 1939 and

1954. How did the first defendant know about the official demarcation of the boundary between that period? The first defendant never disclosed the source of this information. In my view, the source of the information must be disclosed because the first defendant, according to his identity card, was born in 1946! He was not around in 1934 which was, presumably, the year when the official demarcation of the boundary started. And in 1954, he was only about eight to nine years old. Then in paragraph 5.1(d) of the same affidavit the first defendant deposed that 'we have been continuously using and occupying our said native customary land since the time of our ancestors by farming, hunting and collecting forest produce therein and fishing in the rivers thereat.' This would suggest that the defendants never left the area which they claimed as their native customary land. However from the photographs exhibited by the first and second defendants in their affidavits — encll 12 and 13 — it does not seem so. As contended by the plaintiff in its reply to the affidavits, the area shown in the photographs does not seem to be under cultivation and that the huts seemed to be quite recent. The defendant answer to this contention is that the plaintiff is ignorant of the practice of shifting cultivation practised by the defendants and that the plaintiff had not gone to the ground to see the area itself. Even if this so and that the practice of shifting cultivation has been going on for years it would be quite improbable in my view that each time the defendants shifted their cultivation the defendants would build new hut. I think it is more probable to expect that the daily lives of the natives that live in the interior revolve around their longhouses; and that their 'temuda' or farms would not be far from their longhouses to which they would return after the day's work is done.

[37] In the case of *Ara binte Aman & Ors v Superintendant of Lands and Mines 2nd Division* [1979] 1 MLJ 208, the appellant claimed native customary rights over certain lands. Their claim was dismissed by the District Court at Kuching and they appealed to the High Court. The High Court dismissed the appeal. In that case, evidence was adduced by the appellant to show that the jungle was felled when one of the witnesses in that case was only 13 years old. The appellants also told the trial court that they knew about the land because their father and mother told them about it. The High Court which heard the appeal said that in cases of this nature the issue is one of fact and found that this evidence unsatisfactory. As such, the court said, the appellants failed to discharge the burden of proof. At p 208, the court says as follows:

> That all the appellants in this case failed to discharge the burden of proof which lay upon them to prove that at the time of Settlement they were entitled to the parcels of land is plain enough.
>
> Their evidence has been proved to be uncorroborated, unconvincing, contradictory, and based partly on hearsay.

[38] Whilst it is true that the case of *Ara binte Aman & Ors*, was decided after a full trial, the principle remains the same. That is the burden is on the defendants to prove the existence of the native customary rights and if the court finds, on the affidavits' evidence, that the evidence is unsatisfactory and unconvincing, the court may reject the evidence. To prove their claim of native

customary rights the defendants must do so by cogent evidence. Bare assertion would not be sufficient (lihat *Tapah bin Bangkol v Superintendant of Lands and Surveys* [1999] 3 MLJ 588).

[39] Learned counsel for the defendants submitted that the defendants are Iban by race. Therefore they are natives of Sarawak. He cited the case of *Nor Anak Nyawai & Ors*, the headnote 1 which reads:

> Although the term 'Iban' was not set out in the Schedule to the Sarawak Interpretation Ordinance (Cap l)(the Schedule), which set out the races to be considered natives of Sarawak, the term 'Iban' also means Dayak(Sea) is one of the races set out in the Schedule, person of the Iban race are natives of Sarawak within the meaning the terms 'native customary rights'.

[40] In that case, the court also held that the fact the plaintiffs had asserted that they are Ibans and that they all spoke Ibans are sufficient prima facie evidence to establish the fact that the plaintiffs are Iban. The burden then shifted to the defendants to establish their assertion that the plaintiffs or which of their ascendants are not Iban.

[41] In this instant case, learned counsel for the plaintiff submitted that the defendants have not shown that they are Ibans. He submitted that in the affidavits by the first defendant, the deponent did not conclusively affirm to what native race he is constituted as native by definition. He further submitted that the only refence to 'Iban' in the first defendant affidavit was when the first defendant deposed "... our iban adat....". It was submitted on behalf of the plaintiff that this is not enough to prove that the defendants are Iban. Learned counsel for the plaintiff submitted that a person of any other race like a Chinese or a Malay may marry to an Iban or resides within an Iban longhouse and lives by Iban adat; but that fact does not make the person an Iban. Learned counsel for the plaintiff cited ss 2(2) and 133 of the Adat Iban Order 1993 which came into force on 1 June 1993 and paragraph 15 at p 25 of the Sarawak Land Law and Adat 1961, an official publication of the State of Sarawak to support his contention.

[42] Sections 2(2) and 133 of the Adat Iban Order 1993 read as follows:

> 2(2) It is hereby declared that the Adat Iban referred to in paragraph (1) shall be the authorized version of the native customary law for all Ibans resident in the State of Sarawak (hereinafter referred to as the 'authorised version') and for all such other persons, cases suits to which, in accordance with the Native Courts Ordinance, 1992 or by virtue of any other written law, it may be lawfully applied.

and s 133 reads:

> The practiced custom of courtship (Ngayap) is meant for the Iban community only. Any person who is not a member of the Iban community and who breaks or abuses the aforesaid custom shall provide a tunggu of 100 Mungkul.

Then paragraph 15 at p 25 of Sarawak Land Laws and Adat 1961 provides as follows:

15 Persons of another race can and do join a community by marriage but it is more usual for the Iban to marry out of his or her community. In marriage among themselves, the Ibans are the only people in the country who claim to arrange at the time of the wedding where the couple shall live: and it may be either the man's or the woman's house. With all others the man follows the woman, except with Chinese where the women always joins her husband's house.

[43] Reading the above provisions or passages, I do not think they wholly support the contention by the learned counsel for the plaintiff. However, they do indicate that the Adat Iban only applicable to Ibans and that people of other races may inter-marry with Ibans but these other races, by virtue of their intermarriages, do not qualify as Ibans or as natives of Sarawak. In any event, I do not find any thing in the affidavits filed by the plaintiff in this case that categorically deny that the defendants are Ibans. Therefore, I find that this fact is not in issue.

[44] Be that as it may, I reiterate that I do not find, in this case, the evidence presented by the defendants in their affidavits to support their claim of native customary rights over Lot 931 which I have alluded to above as satisfactory. The exh A-5 in the first defendant's affidavit purportedly shows the extent of the area claimed by the defendants. According to the first defendant, the map A-5 was given to defendants by an official of the Land and Survey Department 'many many years ago. Unfortunately, the this evidence is not corroborated. The first defendant neither could not identify the official who gave the map A-5 nor did he obtain any affidavit from an official in the Land and Survey Department to confirm that fact.

[45] No doubts in this instant case the evidence are by affidavits. But this does not means that if there is a conflict of evidence in the affidavits the court should as a matter of course ruled that there are triable issues. In such circumstance, the court must evaluate the evidence critically and comes to its proper conclusion as supported by the evidence. In *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212, the Privy Council said at p 341 as follows:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflict of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit, however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he 'may think just' the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth.

[46] Learned counsel for the plaintiff also submitted that the plaintiff evidence as deposed in Wong's affidavit in reply II (encl 25) was not contradicted or challenged by defendants. As such, the evidence is to be accepted as true. Learned counsel cited the case of *Ng Hee Thong & Anor v Public Bank Bhd* [1995] 1 MLJ 281. At p 286 of the case, Gopal Sri Ram JCA says as follows:

Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as admission by of the fact so asserted: *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332.

[47] Then there is s 15(1) of the Code as amended by Land Code (Amendment) Ordinance 2002 (Cap A95/02) which came into force on 1 June 2002. The section reads:

15(1) Without prejudice to sections 18 and 18A, where native customary rights have been lawfully created over State land, such land shall not be alienated or be used for a public purpose until all native customary rights have been surrendered or terminated or provision for compensating the person entitled thereto have been made.

[48] The word 'shall' in the section makes it mandatory on the part of the Director of Land and Survey, who is the authority to alienate State land under s 13(1) of the Code, to ensure that all native customary rights over State land had been surrendered or terminated or that provision have been made to compensate those who are entitled to compensation before alienating any State land over which customary rights have been lawfully created. In this regard reference to s 2, the interpretation section, of the Code is useful. That section defines the term 'alienation' to mean 'sale, lease or other disposal by a document of title of State land by or on behalf of the Government;'. In this instant case, the plaintiff was given a provisional lease. That is alienation. By that fact it would mean, in my view and in the light of s 15(1) of the Code, the land is a State land and having no native customary rights lawfully created over it. If there have been such rights then it would have been surrendered, terminated or provision for its compensation have been made.

[49] For the above reasons, I allow the plaintiff's application to enter into possession of the land with costs to the plaintiff. Costs to be taxed unless agreed.

Plaintiff's application allowed with costs.

Reported by Mohd Nizam Hamdan